SUPREME COURT, STATE OF COLORADO

Case No. 93 SA 17

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BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES

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RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, and THE CITY COUNCIL OF ASPEN,

Plaintiffs-Appellees,

V.

ROY ROMER as Governor of the State of Colorado and GAIL NORTON as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Apellants,

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ROY ROMER as Governor of the State of Colorado and GAIL NORTON as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Apellants,

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## INTEREST OF AMICUS

Colorado for Family Values (CFV) is the grassroots organization that drafted the language of Amendment Two and worked for its passage. Having expended considerable resources, CFV is interested in the continued vitality of Amendment Two. CFV continues to educate the public concerning special rights legislation based upon sexual behavior.

CFV desires to maintain the integrity of our constitutional government, namely the separation of powers. Since states have the right to develop their body of human rights law, CFV is interested in protecting the rights of

the citizens of Colorado who have expressed their will in Amendment Two pursuant to the right of the people to "govern themselves" according the Colorado Constitution.

## SUMMARY OF ARGUMENT

The trial court judge abused his discretion in granting the Plaintiffs' motion for a preliminary injunction where the requirements of Rathke were not met as a matter of law. A Reasonable likelihood of success on the merits could not necessarily be shown where the trial court judge created a new fundamental right and identifiable class. The wrongful grant of the Preliminary Injunction violates the Doctrine of the Separation of Powers because preliminary injunctions are to be granted "sparingly" and "cautiously" in light of deference to the proper legislative exercise of power by the people. States are entitled to develop their human rights law. In light of this, states have dealt with persons who engage in sexual behavior in a number of ways. The people of Colorado have chosen one manner of dealing with people who engage in homosexual behavior in the human rights law. The people of Colorado's expressed will in Amendment Two should be recognized and upheld.

## ARGUMENT

**I. The trial court judge abused his discretion in granting the Plaintiffs' motion for a preliminary injunction where the requirements of Rathke were not met as a matter of law.**

In Rathke v. McFarlane, 648 P.2d 651 (Colo. 1982), the Colorado Supreme Court set forth the standard for granting or denying of preliminary injunctions to be as follows:

1. The Plaintiffs have a reasonable probability of success on the merits of the entire case;
2. There is a danger of real, immediate, and irreparable injury to the Plaintiffs which may be prevented by injunctive relief;
3. There is no plain, speedy or adequate remedy at law;
4. The granting of the preliminary injunction will not disserve the public interest;
5. The balance of the equities favors the injunction;
6. The injunction will preserve the *status quo* pending a trial on the merits.

Id. at 653

**A. Plaintiffs must demonstrate a reasonable likelihood of success on the merits before they are entitled to injunctive relief.**

If the Plaintiffs cannot meet every one of these six criteria, then injunctive relief may not be granted. Rathke, 648 P.2d at 654; See also Otero Savings and Loan Ass'n v. Federal Reserve Bank, 665 F. 2d 275 (10th Cir. 1981). The Plaintiffs did not meet the first requirement of Rathke becuase they did not demonstrate a "reasonable likelihood of success on the merits" and failed to establish probability of success beyond a reasonable doubt. See Rathke, 648 P.2d at 655, the trial court judge abused his discretion in granting the motion for a preliminary injunction.

The Colorado courts have recognized that satisfying the first prong of Rathke is a prerequisite to injunctive relief. In rejecting the moving party's contention in Rathke that the "trial court should have focused on the interplay of all factors relevant to the grant or denial of a preliminary injunction," the Rathke Court held:

> In the [moving party's] view, the degree of likelihood of success on the merits is merely one factor which must be considered and balanced with the comparative injuries of the parties in determining whether a preliminary injunction should issue. *We disagree. In view of the extraordinary relief inherent in the issuance of a preliminary injunction, it is simply not unreasonable to require the moving party to demonstrate a reasonable probability of success on*

*the merits as a prerequisite to obtaining injunctive relief.*

Id. at 654 (emphasis added).

**B. A Reasonable likelihood of success on the merits could not necessarily be shown where the trial court judge created a new fundamental right and identifiable class.**

In determining whether plaintiffs have satisfied the first prong, the Court in Rathke held that the trial judge was "obliged to assess the proper legal standards and applicable burden of proof which would be required at a subsequent trial on the merits." Id. at 655. In the case at bar, it is evident from the opinion of the trial court judge that he misconstrued the law where he stated that in the trial on the merits that "[t]he amendment will be reviewed as though it is one involving a fundamental right as affecting an identifiable class. That [sic] requires strict scrutiny."[1] He further stated that this fundamental right was "the right not to have the State endorse and give effect to private biases" that he misconstrued the law.[2] In order to reach this conclusion, this trial court judge had to craft a new "fundamental right" for the Plaintiffs as well as creating an "identifiable class".

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1. See Reporter's Transcript, p. 30, lines: 5-7.

2. The Defendants have properly argued that the standard of review should be the "rational basis standard" See Appellant's Brief in Support of Defendant's Motion to Dismiss Amended Complaint.

**New Fundamental Rights**

The trial court's creation of this innovative fundamental right ignores the United States Supreme Court's reluctance in Bowers v. Hardwick, 478 U.S. 186 (1986), to proliferate fundamental rights. Justice White in delivering the opinion for the Court stated:

> [W]e are [not] inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental."

478 U.S. 186, 194-95 (1986).

Nevertheless, the trial court judge extended the language found in Reitman v. Mulke, 387 U.S. 369 (1967) to fashion a new fundamental right for the plaintiffs. Reitman involved the Supreme Court review of a California Supreme Court ruling that invalidated a constitutional amendment which allowed private individuals the absolute discretion to determine to whom to sell or rent their real property. The U.S. Supreme Court found "no persuasive considerations" to overturn the California court's judgment that the amendment would impermissibly "significantly encourage and involve the

State in private discriminations" based upon race.[3] The use of Reitman is inapposite principally because Reitman involved the invalidation of a state law based upon an impermissible racial classification.[4] As will be discussed in the next part of this brief, race is one of those few categories of persons to which the court has extended "suspect class" status. The plaintiffs have not (and cannot) demonstrate that persons who engage in homosexual behavior are entitled to such status.[5] Furthermore,

3. Id. at 381.

4. The trial court judge indicated that:
[t]he defendants, quite rightly, point out that the majority of cases offered by the plaintiffs deal with race, as does Reitman versus Mulkey, and not with questions of sexual orientation. The Court notes that defendants are right. That's correct. But the Court also notes it wasn't very surprised by that. And the reason it wasn't very suprised by that is because the history of discrimination law in the United States is based on race. It started with the 14th Amendment which talked about slavery. And most, I will say, of the law has dealt then with the history of discrimination. And so most of these cases do talk about race. Race has a very special place in our legal history. And I think it may well have a small place here. Reporter's Transcript, p. 14, lines: 10-12.

5. One case that involves a meaningful discussion of the issue is State v. Walsh 713 S.W. 2d 508, 510 (Mo. 1986). The Court held:

> The ACLU argues, based upon social science data, that the *homosexual orientation* is something over which "[a] person has very little control * * * is not acquired voluntarily and is extremely difficult, if not impossible, to change." First, the determination sought by the ACLU is one involving the consideration, evaluation and implementation of social science date relating to the causes, treatments, etc. of the homosexual orientation. The propriety of a court making such a determination is debatable.
>
> We believe that the weighing of such social science data is better left to the legislative department and will defer to its determinations.

Amendment Two's prohibition of state recognition of persons who engage in homosexual behavior as a protected class need not be based merely upon "private biases".[6] As the next section will show, the second part of the trial court judge's determination that persons who engage in homosexual behavior are an "identifiable class" is fraught with difficulties.

**An Identifiable Class**

As it has been noted earlier, Reitman involved a racial classification. The contextual framework of Reitman was against the backdrop of a history of discrimination in this nation against blacks. It was against this backdrop of discrimination that the court has extended special protection to members of this category of persons. The Supreme Court of the United States has extended similar protections to include only four other "suspect" or "quasi-suspect" classes.[7] The trial court judge recognized that

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6. The State has offered many legitimate objectives for Amendment Two. See Appellant's Brief in Support of Defendant Motion to Dismiss Amended Complaint pp. 73-79.

7. The United States Supreme Court has been reluctant to enlarge the list of "suspect" or "quasi-suspect" classes. The Supreme Court has recognized only three classifications as suspect: race, Loving v. Virginia, 388 U.S. 1, 11, 87 S. Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967) alienage, Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.ed.2d 534, and national origin, Korematsu v. United States, 323 U.S. 214, 216,65 S. Ct.193, 194, 89 L.Ed 194 (1944) and two others as quasi-suspect: gender, Mississippi University for Women v. Hogan, 458 U.S. 718, 723-24, 12 S.Ct. 3331, 3335, 73 L.Ed 2d 1090 (1982) and

illegitimacy, Lalli v. Lalli, 439 U.S. 259, 99 S.Ct. 518,523, 58 L.Ed.2d 503 (1978).

However, the Supreme Court has used several explicit criteria to identify suspect and quasi-suspect classifications. In San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), the Court stated that A suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Id. at 28, 93 S.Ct. at 1294.

The immutability of the group's identifying trait is also a factor to be considered. See Frontiero v. Richardson, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973). As one federal court has stated: Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes, e.g. blacks or women, exhibit immutable characteristics whereas homosexuality is primarily behavioral in nature (citations omitted) the conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups. Woodard v. United States 871 F.2d 1068 at 1076 (1989).

Plaintiff will not be able to meet the criteria elucidated in these cases where 1) they cannot demonstrate a history of discrimination comparable to what racial minorities have experienced, 2) homosexual behavior is a matter of choice and not immutable (incidentally not all immutable behavior is protected. *e.g.* mental illness) and 3) plaintiffs cannot demonstrate political powerlessness. Again State v. Walsh, 713 S.W. 2d 508, 511 (Mo. 1986), sheds insight on the issue:

> Finally, the ACLU contends that "homosexuals certainly have a strong claim [to political powerlessness] based on years of discrimination and derogatory stereotyping that inevitably augurs against bringing their legitimate concerns out into the open and into the mainstream of political give and take." We are unpersuaded. Homosexuals, as such, have never been denied the ability to engage in "political give and take." That being identified as a homosexual has involved certain political costs does not diminish this ability. The ACLU has again begged the question. If homosexual conduct is properly forbidden, and social stigma attaching to those who violate this proscription cannot be constitutionally suspect. The fact that the democratic process does not respond to those who violate its ordinances is no source of condemnation. Are we to say that drug addicts or pedophiliacs are a powerless class because the democratic process has refused to sanction the activity they seek to have sanctioned? Are we to say the same if society stigmatizes them? We think not. To hold that the losers in a public policy determination constitute a powerless class for purposes of determining the suspectness of the resulting classification is ludicrous upon its face.

See Appendix noting states that have granted special protections to people who engage in homosexual behavior.

the plaintiffs did not establish as a matter of law that they are a suspect class entitled to special protections.[8]

To circumvent the State's argument that this cannot be an identifiable class because of the holding in Bowers v. Hardwick, (i.e. no fundamental right to engage in consensual sodomy) the trial court judge cites Robinson v. California, 370 U.S. 660 (1962) for the proposition that the law recognizes a distinction between status and conduct. Robinson has never been used outside the criminal context. The Court made it clear in Robinson that it was concerned with criminalization. Moreover, in Robinson the Court was clearly concerned about the nature of the sanction. In contrast, there is no criminal disability attached to Amendment Two. Furthermore, other federal courts that have addressed this issue have dismissed this distinction between status and conduct as being a distinction without a practical difference.

For instance, in Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) the court stated:

8. The trial court judge stated:
What is the law on discrimination? What has it been? As I mentioned it started with the 14th Amendment which was former slaves. It related to blacks. It related to race. It has been largely dominated by racial cases. The evolution has developed some legal standards, and they were argued yesterday, and I'm going to now discuss those.
One, is that a violation which involves something -- violaton of a fundamental right which involves something called a suspect class, even if it's not a fundamental right, calls for strict scrutiny by the Court. It's not here. Plaintiffs haven't argued it. It's not for the Court to determine.
Reporter's Transcript, p. 22, lines: 5-18.

> In Hardwick, to be sure, plaintiffs did not rely on the equal protection clause....[But i]f the court was unwilling to object to state laws that criminalized the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."

It is arguable whether Amendment Two even draws a classification at all.[9] The interpretation offered by the State buttresses this point that Amendment Two simply prohibits the state from classifying persons for benefits based on their sexual behavior.[10]

It is clear from his opinion that the trial court judge is attempting to extend the legacy of 14th amendment protections to include those persons who engage in

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9. It can be argued that Amendment Two prevents the State from classifying persons on the basis of their sexual behavior. Moreover it has not been asserted that anyone other than persons who engage in homosexual behavior would seek extraordinary protection on the basis of sexual behavior.

A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. Plyler v. Doe, 457 US 202, 72 L.Ed.2d 786, 102 S.Ct. 2382

10. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. Dandridge v. Williams, 397 US 471 ____ McGowan v. Maryland, 366 US 420, 426, 6 L.Ed.2d 393, 399, 81 S.Ct. 1101.

People ex rel. C.M., 630 P.2d 593 (1981) "[I]f a statute is susceptible to different interpretations, one of which comports with constitutional requirements, the constitutional construction must be adopted."

homosexual behavior.[11] Such judicial activism is unwarranted.

Given these innovations, the first prong of Rathke *necessarily* could not have been met. Such an innovation vitiates the meaning of the "reasonable likelihood of success on the merits" prong. Under current law, the plaintiffs did not meet their burden of proof to establish that there was a reasonable likelihood of success that they would prove that Amendment Two was unconstitutional beyond a reasonable doubt. It is obvious that the consequence of adopting the trial court judge's view that the "law is evolving" and new rights may be brought to light by a "humane justice" is utter confusion.[12] In such a scenario, litigants could never be certain of the law as it affected their case much less being able to demonstrate a "reasonable likelihood of success on the merits." The Supreme Court of Colorado could not have intended this anomalous result. Such an interpretation of the first prong of Rathke is in error and should be reversed.

Under current law, the defendants, by contrast *have* demonstrated that the Amendment Two is constitutional. If the legislature or the people of Colorado were to decide to extend protections to the persons who engage in homosexual behavior, they could do so. However the inverse is

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11. See Reporter's Transcript at _____

12. Reporters Transcript at p. 21 lines 11-22.

precisely what the people of Colorado did by Amendment Two. They declined to allow the state to extend special protections to people who engage in homosexual behavior.

**II. The wrongful grant of the Preliminary Injunction violates the Doctrine of the Separation of Powers because preliminary injunctions are to be granted "sparingly" and "cautiously" in light of deference to the proper legislative exercise of power by the people.**

In Rathke, this Court stated:

> [T]he courts have generally been reluctant to grant such relief where "the actions complained of are those of the departments of the executive and legislative branches of government, in the exercise of their authority. The constitutional basis for judicial deference in this regard is the doctrine of separation of powers, which serves to restrain one branch of government from usurping or restraining the proper exercise of powers of another branch.

648 P.2d at 651.

However, Amendment Two was not an exercise of legislative power by the legislature but by the people themselves. Accordingly, this is a factor that militates against judicial intervention. Another factor would be that the long-established rule in Colorado is that such an exercise of legislative power is cloaked with a presumption of constitutionality.[13] Before the contrary can be assumed,

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13. "The long-established rule in Colorado is that every statute is presumed to be constitutional until and unless the contrary is shown beyond a reasonable doubt." Rathke, 648 P.2d at 655.

the unconstitutionality must be shown beyond a reasonable doubt.[14] The unconstitutionality cannot be assumed in the case at bar, where the judge created a new fundamental right so that the plaintiff could be afforded injunctive relief.

The importance of the constitutional mandate that "the separation of powers be held inviolate"[15] has been emphasized by this court in a number of cases. In Pena v. District Court of Second Jud. Dist., 681 P.2d 953, 956 (Colo. 1984) (citing Smith 153 Colo at 40, 384 P.2d at 741), this Court stated: "The separation of powers doctrine imposes upon the judiciary a proscription against interfering with the executive or legislative branches. In Smith v. Miller, 384 P.2d 738 (1963) quoting language from State v. Cunningham, 39 Mont. 165, 101 P. 962, this Court stated that to assert a power that does not belong to it is a "violation of the people's confidence."[16] The Court has also stated:

> We cannot be unmindful that this court must not usurp power, or abuse its right of construction, or lose sight of the dangers which may arise, not only to the state, but to the court itself from such usurpation and abuse. It is just as important for the preservation and just administration of the government of this state that the power of courts should be exerted only within the limits of the Constitution...."

People v. Prevost, 134 P. 129, 133 (1913).

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14. Rathke 648 P.2d at 655

15 City of Rockyford v. Brown, 293 P.2d 974, 976 (1956).

16. 384 P.2d at 741.

Such judicial usurpation has taken place here where the trial court judge ignored the admonition that preliminary injunctions be granted "sparingly " and "cautiously" with proper deference to the legislative will of the people. To rule that the plaintiffs have met their burden of demonstrating a reasonable likelihood of success on the merits where the trial court judge created a new fundamental right not recognized by any court cannot be characterized as anything other than raw judicial activism which translates into a usurpation of legislative power and thereby disenfranchises the electorate.

Moreover this is a case where the people have acted not the legislature.[17] In People v. Prevost, it was held that "the people have the sovereign right to amend their constitution if they so desire...." Id. at 133. The people of the State of Colorado "have the sole and exclusive right of governing themselves." *Colo. const.* art. II, section 2. Moreover, article II, section 1, of the Colorado Constitution provides that "[a]ll political power is vested in and derived from the people." Article V, section 1, describes the power of the people to initiate laws as follows:

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17. In Urevich v. Woodard, 667 P.2d 760 (Colo 1983) at 762, 763, the Court stated:

> The balance between the legislative power of the general assembly and the legislative power of the people has been struck in favor of the people in the fundamental charter of our state.

> "The legislative power of the state shall be vested in the general assembly ... but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly ...."

The right of the people to initiate legislation is a right "of the first order." McKee v. City of Louisville, 200 Colo. 525, 616 P.2d 969, 972 (1980). "[I]t is not a grant to the people but a reservation by them for themselves." Id. The Court has also held that the "power of initiative is a fundamental right at the very core of our republican form of government."[18]

By passing Amendment Two, the people of Colorado have prohibited the state from classifying persons on the basis of their sexual behavior. The next section of this brief discusses the manner in which other states have dealt with homosexual behavior.

**III. States have dealt with persons who engage in sexual behavior in a number of ways. The people of Colorado have chosen one manner of dealing with people who engage in homosexual behavior in the human rights law.**

a. Some states have criminalized homosexual behavior in sodomy statutes.

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18 *See E.g.*, Bernzen v. City of Boulder, 186 Colo. 81, 525 P.2d 416 (1974); Brownlow v. Wunsch, 103 Colo. 120, 83 P.2d 775 (1938).

Currently, twenty states and the District of Columbia have criminal sodomy laws.[19] Six states maintain statutes that criminalize homosexual sodomy: Arkansas, Kansas, Missouri, Montana, Nevada and Texas, which provide different definitions of the crime. In Arkansas sodomy is defined as the "penetration. . . of the anus or mouth of a person by the penis of a person of the same sex" or "penetration. . . of the vagina or anus of. . . a person by any body member of a person of the same sex".[20] In Kansas a person commits "sodomy between persons who are members of the same sex"; where there is "oral or anal copulation;. . . or any penetration of the anal opening by any body part of object");[21] In Missouri, sodomy is defined as "deviate sexual intercourse with another person of the same sex";[22] In Montana "deviate sexual relations" defined as "sexual

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19. See Ala Code §13A-6-65(a)(3) (1982) (1-year maximum); Ariz Rev Stat Ann §§13-1411, 13-1412 (West Supp 1985) (30 days); Ark Stat Ann §41-1813 (1977) (1-year maximum); DC Code §22-3502 (1981) (10-year maximum); Fla Stat §800.02 (1985) (60-day maximum); Ga Code Ann §16-6-2 (1984) (1 to 20 years); Idaho Code §18-6605 (1979) (5-year minimum); Kan Stat Ann §21-3505 (Supp 1985) (6-month maximum); Ky Rev Stat §510.100 (1985) (90 days to 12 months); La Rev Stat Ann §14:89 (West 1986) (5-year maximum); Md Ann Code, Art 27, §§553-554 (1982) (10-year maximum); Mich Comp Laws §750.158 (1968) (15-year maximum); Minn Stat §609.293 (1984) (1-year maximum); Miss Code Ann §97-29-59 (1973) (10-year maximum); Mo Rev Stat §566.090 (Supp 1984) (1-year maximum); Mont Code Ann §45-5-505 (1985) (10-year maximum); Nev Rev Stat §201.190 (1985) (6-year maximum); NC Gen Stat §14-177 (1981) (10-year maximum); Okla Stat, Tit 21, §886 (1981) (10-year maximum); RI Gen Laws §11-10-1 (1981) (7 to 20 years); SC Code §16-15-120 (1985) (5-year maximum); Tenn Code Ann §39-2-612 (1982) (5 to 15 years); Tex Penal Code Ann §21.06 (1974) ($200 maximum fine); Utah Code Ann §76-5-403 (1978) (6-month maximum); Va Code §18.2-361 (1982) (5-year maximum).

20. Ark Code Ann 5-14-122 (Michie 1987)

21. Kan Stat Ann §21-3501(2), 21-3505 (Supp. 1987)

22. Mo Ann Stat §566.090.1(3) (Vernon 1979)

contact or sexual intercourse between two persons of the same sex");[23] Nevada's ("the infamous crime against nature" defined as "anal intercourse, cunnilingus or fellatio between consenting adults of the same sex");[24] Texas has a prohibition against "deviate sexual intercourse with another individual of the same sex" where deviate sexual intercourse is "any contact between any part of the genitals of on person and the mouth or anus of another person" or "the penetration of the genitals or anus of another person with an object").[25] Some states impose fines as well as periods of incarceration.

The Supreme Court has upheld the constitutionality of sodomy statutes in Bowers v. Hardwick where the Court held: "This is essentially not a question of personal 'preferences' but rather of the legislative authority of the state. I find nothing in the Constitution depriving a state of the power to enact the statute challenged here. 478 U.S. at 197.

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23. Mont Code Ann §45-1-101(20), 45-5-505(1)(1987)
24. Nev Rev Stat Ann §201.190 (Michie 1986)
25. Tex Penal Code Ann §21.06,21.01(1) (Vernon 1974 & Supp. 1988). The constitutionality of Texas' sodomy law is currently being appealed. The Lower Court decision can be found in State of Texas v. Morales, 826 S.W.2d 201 (1992).

b. Some states have included "sexual orientation" as a protected class in their human rights laws.

Currently six states have included "sexual orientation "in their human rights laws: Massachusetts, Hawaii, Wisconsin, New Jersey, California and the District of Columbia.[26]

In addition, a number of localities have adopted measures to prohibit discrimination on the basis of sexual orientation by private citizens and organizations.[27] Sexual

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26. Cal Lab Code §1102.1 (West 1992); D.C. Code Ann §1-2501 (1992); Mass Gen Laws Ann ch. 151b §4 (West 1992); Haw Rev Stat §378-2 (1992); NJ Stat Ann §10-5-4 (West 1992); Wis Stat §111.36 (1991).

27. **Sexual Orientation and the Law, Harvard University Press. (1990). Footnote 51:**

According to the Lambda Legal Defense and Education Fund, Inc., the following cities and counties have enacted some form of anti-discrimination regulation: Tucson (Arizona); Berkeley, Cupertino, Davis, Laguna Beach, Los Angeles, Mountain View, Oakland, Sacramento, San Francisco, San Jose, Santa Barbara, Santa Cruz, and West Hollywood (California); Aspen and Boulder (Colorado); Hartford (Connecticut); District of Columbia; Atlanta (Georgia); Honolulu (Hawaii); Champaign, Chicago, Evanston, and Urbana (Illinois); Iowa City (Iowa); Baltimore, and Montgomery County (Maryland); Amherst, Boston, and Malden (Massachusetts); Ann Arbor, Detroit, East Lansing, Ingham County, Lansing, and Saginaw (Michigan); Hennepin County, Minneapolis, and Mankato (Minnesota); Alfred, Buffalo, Ithaca, New York City, Rochester and Troy (New York); Chapel Hill, Durham, and Raleigh (North Carolina); Columbus, Cuyahoga, and Yellow Springs (Ohio); Portland (Oregon); Harrisburg and Philadelphia (Pennsylvania); Austin (Texas); Clallam County, King County, Olympia, Pullman, and Seattle (Washington); Dane County, Madison, and Milwaukee (Wisconsin). *See* Letter from Paula L. Ettelbrick, Legal Director, Lambda Legal Defense and Education Fund, Inc., to Anne Seidel (Mar. 7, 1989).

orientation has been included in a number of executive orders or administrative regulations.[28]

c. Some states have not enlarged their protected classes to include "sexual behavior".

The vast majority of states have not extended "protected class" status to persons who engage in homosexual behavior. In fact, a recent bill (SB 91) introduced by New Mexico Senator Tom Rutherford proposing that the Human Rights Act of New Mexico be amended to include "sexual orientation" was defeated in committee in March of this year. States have extended protections to a number of other classes of persons. Some of those protections include: race, color, sex, religion, creed, age, physical/mental disabilities, marital status, the use of guide dogs, national origin, ancestry, sexual orientation, membership in the armed forces, veterans, unfavorable discharge from the military, political ideas or affiliation, use or nonuse of lawful products, receiving public assistance, lawful source of income, arrest or conviction record, participation in lawful activity, familial status, pregnancy, children height, weight and ethnicity.

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28. California, Louisiana, Minnesota, New Jersey, New Mexico, New York and Pennsylvania and the District of Columbia.

The people of Colorado have expressly prohibited the state from extending benefits to persons based on their sexual behavior.

## Conclusion

The trial court judge abused his discretion by granting the plaintiffs motion for a preliminary injunction where plaintiffs did not fulfill the first requirement of *Rathke* (i.e. did not demonstrate a reasonable likelihood of success on the merits) and could not by definition do so where the trial court judge created a new fundamental right and identifiable class to grant plaintiffs the desired relief. Such judicial activism violates the constitutional design of the governance of Colorado which secures the separation of powers. Amendment Two is a valid exercise of the legislative powers reserved to the people. The people have expressed their will concerning the development of their human rights law without constitutional defect. If the trial court's ruling is upheld, the words of this Court in People v. District Court 68 p. 242, 257 (1901) (quoting De Chastellux v. Fairchild, 15 Pa. 18, 53 Am. Dec. 570), when a branch such the Judiciary usurps the power of another branch or thwarts the will of the people with constitutional warrant, it will have "effected a revolution, not in the form of the government, but in its action; then will there be a concentration of the powers of the government in a single branch of it, which, whatever may be the form of the

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## Conclusion

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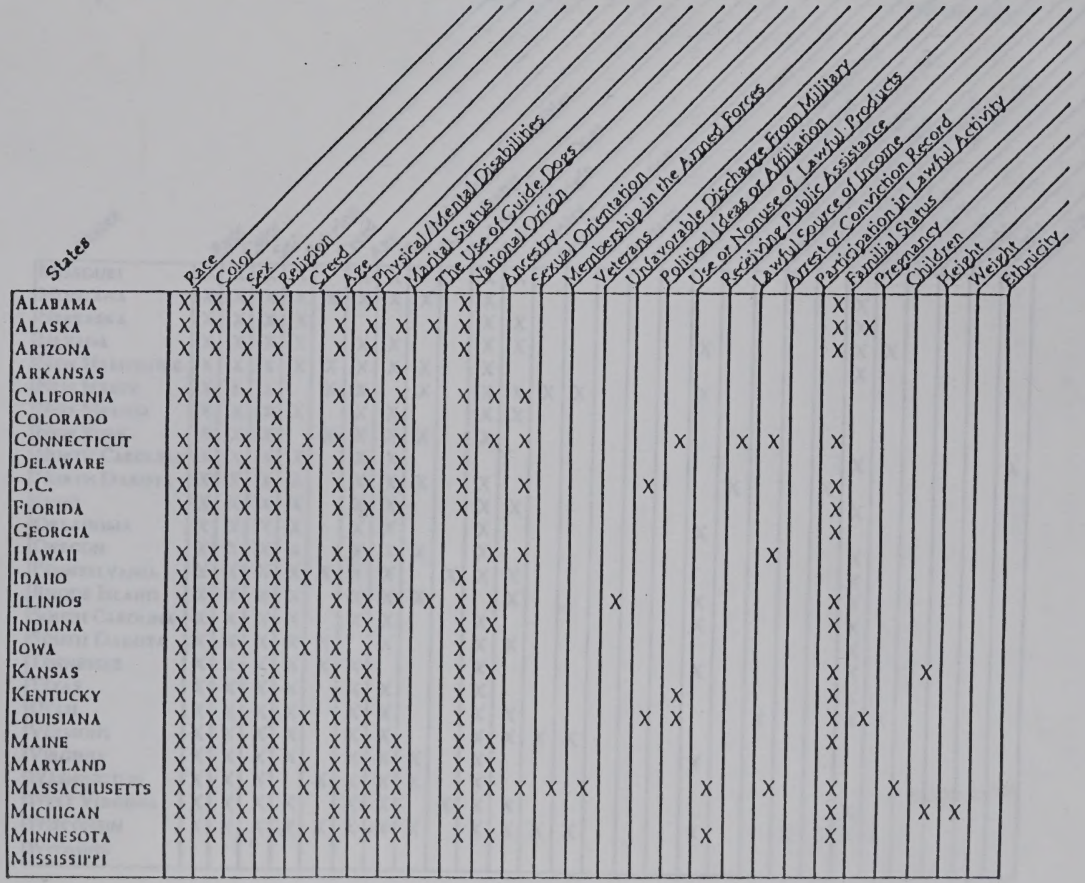
constitution, will be despotism, - a government of unlimited, irresponsible, and arbitrary rule."

Accordingly, the decision of the trial court judge should be reversed.

# Civil Rights Laws

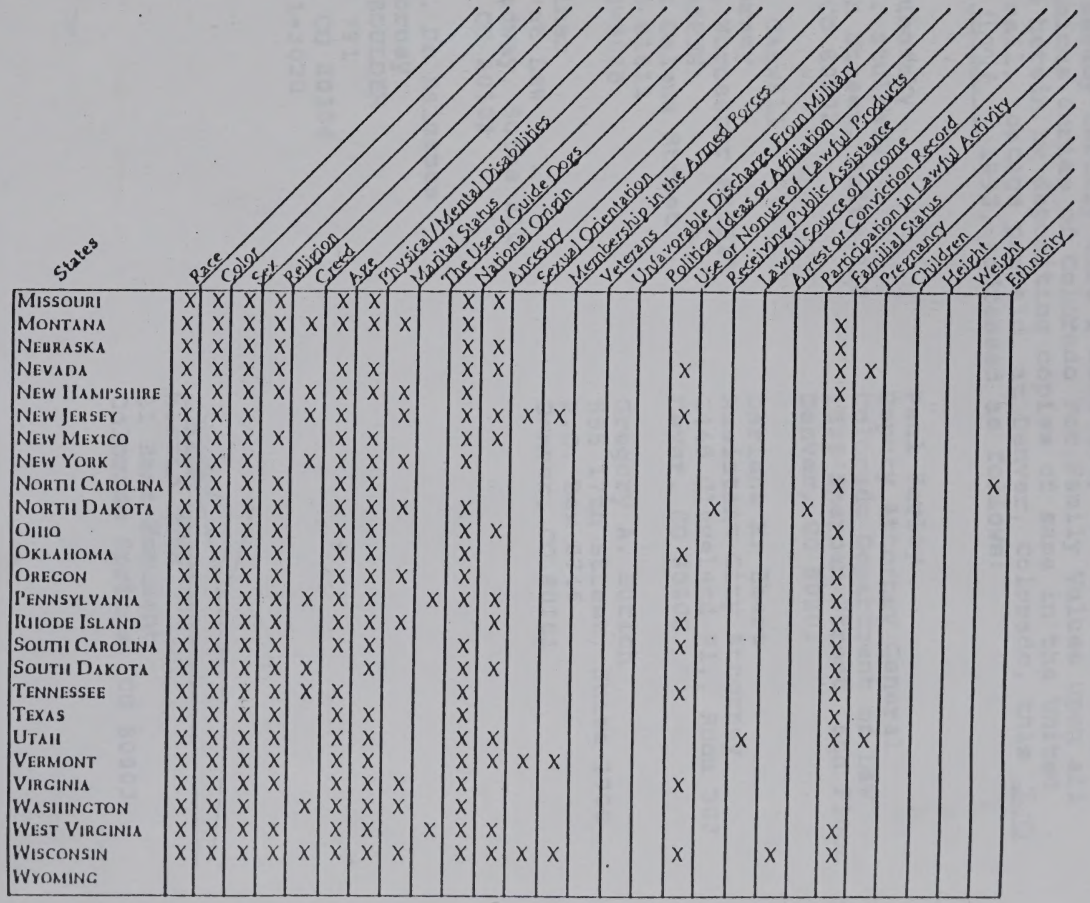
## Chart One



| States | Race | Color | Sex | Religion | Creed | Age | Physical/Mental Disabilities | Marital Status | The Use of Guide Dogs | National Origin | Ancestry | Sexual Orientation | Membership in the Armed Forces | Veterans | Unfavorable Discharge From Military | Political Ideas or Affiliation | Use or Nonuse of Lawful Products | Receiving Public Assistance | Lawful Source of Income | Arrest or Conviction Record | Participation in Lawful Activity | Familial Status | Pregnancy | Children | Height | Weight | Ethnicity |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Alabama | X | X | X | X | | X | X | | | X | | | | | | | | | | X | | | | | | | |
| Alaska | X | X | X | X | | X | X | X | X | X | | | | | | | | | | X | X | | | | | | |
| Arizona | X | X | X | X | | X | X | | | X | | | | | | | | | | X | | | | | | | |
| Arkansas | | | | | | | | X | | | | | | | | | | | | | | | | | | | |
| California | X | X | X | X | | X | X | X | | X | X | X | | | | | | | | | | | | | | | |
| Colorado | | | | X | | | | X | | | | | | | | | | | | | | | | | | | |
| Connecticut | X | X | X | X | X | X | | X | | X | X | X | | | | X | | X | X | X | | | | | | | |
| Delaware | X | X | X | X | X | X | X | X | | X | | | | | | | | | | | | | | | | | |
| D.C. | X | X | X | X | | X | X | X | | X | | X | | | X | | | | | X | | | | | | | |
| Florida | X | X | X | X | | X | X | X | | X | | | | | | | | | | X | | | | | | | |
| Georgia | | | | | | | | | | | | | | | | | | | | X | | | | | | | |
| Hawaii | X | X | X | X | | X | X | X | | | X | X | | | | | | | X | | | | | | | | |
| Idaho | X | X | X | X | X | X | | | | X | | | | | | | | | | | | | | | | | |
| Illinois | X | X | X | X | | X | X | X | X | X | X | | | | X | | | | | X | | | | | | | |
| Indiana | X | X | X | X | | | X | | | X | X | | | | | | | | | X | | | | | | | |
| Iowa | X | X | X | X | X | X | X | | | X | | | | | | | | | | | | | | | | | |
| Kansas | X | X | X | X | | X | X | | | X | X | | | | | | | | | X | | | | X | | | |
| Kentucky | X | X | X | X | | X | X | | | X | | | | | | X | | | | X | | | | | | | |
| Louisiana | X | X | X | X | X | X | X | | | X | | | | | X | X | | | | X | X | | | | | | |
| Maine | X | X | X | X | | X | X | X | | X | X | | | | | | | | | X | | | | | | | |
| Maryland | X | X | X | X | X | X | X | X | | X | X | | | | | | | | | | | | | | | | |
| Massachusetts | X | X | X | X | X | X | X | X | | X | X | X | X | X | | | | X | | X | | | X | | | | |
| Michigan | X | X | X | X | | X | X | X | | X | | | | | | | | | | X | | | | X | X | | |
| Minnesota | X | X | X | X | X | X | X | X | | X | X | | | | | | | X | | X | | | | | | | |
| Mississippi | | | | | | | | | | | | | | | | | | | | | | | | | | | |

# Civil Rights Laws

## Chart Two


States
Race
Color
Sex
Religion
Creed
Age
Physical/Mental Disabilities
Marital Status
The Use of Guide Dogs
National Origin
Ancestry
Sexual Orientation
Membership in the Armed Forces
Veterans
Unfavorable Discharge From Military
Political Ideas or Affiliation
Use or Nonuse of Lawful Products
Receiving Public Assistance
Lawful Source of Income
Arrest or Conviction Record
Participation in Lawful Activity
Familial Status
Pregnancy
Children
Height
Weight
Ethnicity
Missouri X X X X X X
Montana X X X X X X X X X X
Nebraska X X X X X X X
Nevada X X X X X X X X X X X
New Hampshire X X X X X X X X X X
New Jersey X X X X X X X X X X X X
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Oklahoma X X X X X X X X
Oregon X X X X X X X X X
Pennsylvania X X X X X X X X X X X
Rhode Island X X X X X X X X X X
South Carolina X X X X X X X X X
South Dakota X X X X X X X X X
Tennessee X X X X X X X X X
Texas X X X X X X X X
Utah X X X X X X X X X X X X
Vermont X X X X X X X X X X X
Virginia X X X X X X X X X
Washington X X X X X X X X X
West Virginia X X X X X X X X X X
Wisconsin X X X X X X X X X X X X X X X X
Wyoming

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the within Brief Amicus Curiae of Colorado For Family Values upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 2nd day of April 1993, addressed as follows:

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